Nos. 04-1704 & 04-1724

DEC 5 2005

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *Petitioner*,

v.

CHARLOTTE CUNO, ET AL., *Respondents*.

WILLIAM W. WILKINS, ET AL., *Petitioners*,

v.

CHARLOTTE CUNO, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF NISSAN NORTH AMERICA, INC. IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF NISSAN NORTH AMERICA, INC. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

The State of Ohio, like virtually all States, offers tax benefits and related incentives to both in-state and out-of-state businesses in order to foster local economic development and create jobs for state residents.[1] In particular, Ohio has enacted an investment tax credit ("ITC") that grants a non-

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

refundable credit against the State's corporate franchise tax to any taxpayer that "purchases new manufacturing machinery and equipment" during a qualifying period and installs the equipment in Ohio by a particular date. Ohio Rev. Code § 5733.33(B)(1). *See* 04-1704 Pet. App. 38a.

Amicus curiae Nissan North American, Inc. ("Nissan") has a direct and substantial interest in this case, in which the Sixth Circuit held that the Ohio ITC violates the Commerce Clause, U.S. Const., art. I, § 8, cl. 3. Nissan is a global automobile company headquartered in Japan with major operations in North America, including operations within the Sixth Circuit. Nissan's plant in Smyrna, Tennessee, covers more than five million square feet and is one of the largest automobile production plants under one roof in the United States. Nissan manufactures more than 500,000 vehicles at the Smyrna plant each year, including its Xterra and Pathfinder SUVs, Frontier pickup trucks, Maxima sport sedans, and Altima mid-size sedans. As discussed below, *see infra* at 24-27, Nissan's Smyrna plant and its manufacturing facility in Decherd, Tennessee, have resulted in the investment by Nissan of billions of dollars in infrastructure and equipment in Tennessee as well as the creation of more than 10,000 high wage-paying jobs.

Nissan receives tax incentives from the State of Tennessee based, in part, on the extent of its investment in Tennessee and the full-time workers it employs there.[2] These incentives are part of a coordinated effort by the State to encourage the investment of high wage industries in new plants and equipment in Tennessee. Not only does that effort enjoy strong popular support, it has produced enormous economic dividends for the State. Although the Tennessee incentive scheme differs from the Ohio ITC invalidated by the Sixth

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[2] *See* Tenn. Code § 67-4-2009(4)(A) (providing excise tax credit of 1% percent of purchase price of industrial machinery purchased during tax period and located in Tennessee); *id.* § 67-4-2109(c)(2)(A) (providing $2,000 job tax credit against franchise and/or excise tax liability for each net new full-time employee hired in Tennessee).

Circuit in this case, the Sixth Circuit's decision nonetheless creates uncertainty for businesses such as Nissan that are considering investing in new facilities in Tennessee or other States.

As a major multi-national corporation with global sales, Nissan may consider investing not only in States and communities outside of the Sixth Circuit, but in other countries that may offer more favorable and reliable tax and economic incentives. Foreign competition for manufacturing jobs has become increasingly intense. Respondents' effort to "level the playing field" among the fifty States ignores the reality that the playing field is global, not national, and their attempt to level the field can only result in tilting it in favor of other countries. The decision below jeopardizes the ability of the United States to compete for foreign investment by offering tax incentives. If allowed to stand, the Sixth Circuit's decision will unavoidably affect Nissan's decisions regarding the location of and investment in its manufacturing facilities in the future.

Because of its strong interest in this Court's review of the decision below, Nissan filed a brief *amicus curiae* supporting petitioners at the certiorari stage of this case. The instant brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

I. a. Respondents lack Article III standing to challenge the Ohio ITC in federal court. Most of the respondents are Ohio residents and taxpayers who claim injury based on their status as state taxpayers. These respondents cannot satisfy this Court's requirements for taxpayer standing because they have not alleged a direct injury, pecuniary or otherwise, or an injury distinct from that suffered by other taxpayers or citizens. Nor can these respondents satisfy the general "injury in fact" requirement because their alleged injuries are not concrete and particularized.

The injury alleged with respect to one Ohio respondent is the "slated" condemnation of its property. This respondent unsuccessfully attempted to halt the exercise of eminent domain through litigation, and its property has now been taken. This respondent therefore lacks standing because a favorable decision would not redress its injury.

The remaining respondents are Michigan residents and taxpayers who allege that, but for the Ohio ITC, petitioner DaimlerChrysler Corporation would have located its new plant in Michigan instead of Ohio. It is sheer speculation, however, whether the Michigan respondents would have directly benefited from the jobs and tax revenues a plant in Michigan would have generated. Furthermore, respondents do not allege—and there is no reason to believe—that a judgment rendered in their favor now would lead DaimlerChrysler to proceed to build a plant in Michigan.

b. Even if respondents had standing under Article III, their alleged injuries are not within the zone of interests protected by the Commerce Clause. The negative Commerce Clause protects the right to engage in interstate trade free from restrictive state regulation. But respondents' injuries relate to their status as taxpayers or, in one case, as a property owner injured by the exercise of eminent domain authority. Their injuries are not in the nature of a restriction on their ability to engage in interstate commerce free from state regulation.

In addition, under this Court's cases, a plaintiff seeking to challenge a state law on negative Commerce Clause grounds must have suffered financial or economic injury as either a competitor or a consumer in the marketplace. The Ohio ITC does not, however, cause pecuniary injury to respondents as competitors or consumers in the market.

II. The Ohio ITC does not violate the negative Commerce Clause. The several States, as sovereigns, have wide discretion with respect to the collection of taxes and the granting of tax exemptions. And granting exemptions for the purpose of promoting local industry is a common and historically rooted practice.

This Court has recognized in numerous cases that the negative Commerce Clause allows States to encourage investment and create jobs, including through the structuring of their tax systems. The Court has also indicated that a State may use low taxes and tax exemptions to induce industry to come to the State without violating the Commerce Clause.

The Ohio ITC applies only to activities taking place exclusively within Ohio, does not discriminate against interstate or out-of-state activities, and does not tax any activity taking place, even in part, outside of Ohio. The ITC is therefore a neutral, locally focused provision entirely consistent with the negative Commerce Clause, if it even implicates the Clause.

Federalism principles also support the Ohio ITC. The ITC encourages industry to invest in Ohio rather than other States and thus is an example of the interstate competition that federalism is designed to promote. And permitting States to compete for investment through tax credits is critical to the economic welfare of the States and the Nation, particularly in this era of global economic competition.

III. Nissan's own experience confirms the importance of state tax incentives to local investment and competition. The State of Tennessee provides various tax incentives to business, and such incentives contributed to Nissan's decision to locate in Tennessee its first automobile manufacturing plant in the United States. Since 1980, Nissan has invested $2.8 billion in Tennessee and created some 12,000 jobs.

ARGUMENT

I. RESPONDENTS LACK STANDING TO CHALLENGE THE OHIO INVESTMENT TAX CREDIT ON COMMERCE CLAUSE GROUNDS.

"In every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or

of particular issues." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

The standing doctrine consists of both constitutional and prudential aspects.[3] To satisfy the minimum constitutional requirements for standing, a plaintiff must show (1) an "injury in fact," (2) a "causal connection between the injury and the conduct complained of," and (3) that a favorable decision is likely to redress the injury. *Defenders of Wildlife*, 504 U.S. at 560-561. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. Furthermore, where, as here, "the plaintiff is not himself the object of the government action or inaction he challenges"—that is, where the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*"—it becomes "substantially more difficult" for the plaintiff to establish standing. *Id.* at 562 (emphasis in original) (internal quotation marks omitted). This heightened standard for standing applies to respondents, who are complaining, not about the taxes they must pay, but about the amount of taxes that DaimlerChrysler pays.

A plaintiff cannot satisfy prudential standing requirements if the injury of which the plaintiff complains does not fall "arguably within the zone of interests to be protected" by "the constitutional guarantee in question"—here, the Commerce Clause. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). This Court has applied the "zone of interest" test in a previous negative

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[3] The standing doctrine's constitutional aspect derives from Article III: "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. The concept of standing is part of this limitation." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (citation omitted). The doctrine's prudential aspects "are part of judicial self-government," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and reflect "judicially self-imposed limits on the exercise of federal jurisdiction." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

Commerce Clause case. *See Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977); *see also Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987) (reaffirming the correctness of *Boston Stock Exchange*'s decision on standing).

A. All Three Categories Of Respondents Lack Article III Standing.

As this Court has explained, "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen* v. *Wright*, 468 U.S. at 752. *See Warth* v. *Seldin*, 422 U.S. at 518 ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."). Here, such a careful judicial examination of the Complaint demonstrates that none of the respondents satisfies the constitutional requirements for standing.

1. *The Ohio Respondents.* Most of the respondents are Ohio residents and taxpayers (Complaint ¶¶ 2, 4-6) whose claim of injury is based entirely on their status as state taxpayers. The Complaint alleges that the Ohio ITC "depletes the funds of the State of Ohio to which [they] contribute through their tax payments, thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on [them]." *Id.* ¶ 40. This allegation clearly is insufficient to confer standing upon the Ohio respondents. A state taxpayer attacking a state law as unconstitutional must show "that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Doremus* v. *Board of Ed. of Hawthorne*, 342 U.S. 429, 434 (1952) (internal quotation marks omitted). *See also ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 613-614 (1989) (opinion of Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.) ("[W]e have refused to confer standing upon a state taxpayer absent a

showing of 'direct injury,' pecuniary or otherwise.") (quoting *Doremus*). Here, the Ohio respondents have not alleged a direct pecuniary or other injury. Nor are their alleged injuries "distinct from that suffered in general by other taxpayers or citizens." *Id.* at 613. *See also Massachusetts* v. *Mellon*, 262 U.S. 447, 487 (1923). Finally, apart from the special limitations upon taxpayer standing, the Ohio respondents cannot satisfy the general "injury in fact" requirement because their alleged injuries are not "concrete and particularized." *Defenders of Wildlife*, 504 U.S. at 560.

2. *Kim's Auto.* The Complaint alleges that one of the Ohio respondents, Kim's Auto and Truck Service, Inc., "will be injured" by the Ohio ITC because its property "is slated to be condemned by the City of Toledo, to be taken and conveyed to DaimlerChrysler in aid of the Jeep plant project." Complaint ¶ 41. Kim's Auto attempted in litigation to halt the City's exercise of eminent domain authority but did not succeed. *See City of Toledo* v. *Kim's Auto & Truck Serv., Inc.*, 2003 WL 22390102 (Ohio Ct. App. 6th Dist. Oct. 17, 2003), *appeal not accepted for review*, 804 N.E.2d 42 (Ohio Mar. 3, 2004), *stay of property appropriation denied*, 811 N.E.2d 1148 (Ohio July 14, 2004), *cert. denied*, 125 S. Ct. 2988 (June 28, 2005). Kim's Auto lacks standing because a decision in favor of respondents will not redress the injury it alleged—the "slated" taking of its property has already occurred. *See Eastern Ky. Welfare Rights Org.*, 426 U.S. at 38 (plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision"). The eminent domain litigation having run its course, the City now owns the land, and the building that once stood on the property has been demolished.[4]

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[4] Under the Takings Clause, U.S. Const., amend. V, the owners of Kim's Auto were, of course, entitled to just compensation for the taking of their property for public use. A jury determined that $104,000 represented the fair market value of the property, and the Ohio Court of Appeals upheld that determination. *See Kim's Auto & Truck Serv., Inc.*, 2003 WL 22390102, at *2, *7-*8.

3. *The Michigan Respondents.* A few of the respondents are Michigan residents and taxpayers. *See* Complaint ¶ 3; Second Amended Complaint ¶ 3a. The Complaint alleges that the Ohio ITC injured the Michigan respondents because it was part of a "taxpayer subsidy package which induced DaimlerChrysler to continue to operate its plants in Toledo, rather than an alternative site which, upon information and belief, was to be located within the State of Michigan." *Id.* ¶ 42. The Complaint further alleges that "[i]f the plant or plants had instead been located in Michigan, they would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan [respondents] would have benefited." *Id.*

The Michigan respondents—who are residents and taxpayers of *Michigan* seeking to challenge an *Ohio* tax scheme—plainly lack Article III standing. Assuming *arguendo* that, but for the Ohio ITC, DaimlerChrysler would have built a new plant in Michigan rather than Ohio, it is entirely speculative whether the Michigan respondents would have directly benefited from any new jobs or tax revenues a DaimlerChrysler plant in Michigan would have generated. And "unadorned speculation will not suffice to invoke the federal judicial power." *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 44. Furthermore, the Complaint does not allege, and there is no reason to believe, that a judgment in favor of respondents rendered now would cause DaimlerChrysler to proceed to build a new plant in Michigan. *Cf. Allen* v. *Wright*, 468 U.S. at 758 ("[I]t is entirely speculative * * * whether withdrawal of a tax exemption from any particular school would lead the school to change its [discriminatory] policies."); *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 45-46 ("[T]he complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the [benefit] they desire."). Thus, the Michigan respondents cannot satisfy the standing requirements of Article III.

B. Respondents' Alleged Injuries Are Not Within The Zone of Interests Protected By The Commerce Clause.

Even if respondents possess Article III standing, their alleged injuries are not within the zone of interests protected by the negative Commerce Clause. *See Association of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153; *Boston Stock Exch.*, 429 U.S. at 320 n.3; *see also Premier-Pabst Sales Co.* v. *Grosscup*, 298 U.S. 226, 227 (1936) ("One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him.") (citing *Heald* v. *District of Columbia*, 259 U.S. 114, 123 (1922)).

"The Court has often described the Commerce Clause as conferring a 'right' to engage in interstate trade free from restrictive state regulation." *Dennis* v. *Higgins*, 498 U.S. 439, 448 (1991). *See id.* at 449 ("[T]he Clause was intended to benefit those who * * * are engaged in interstate commerce.") (emphasis omitted). But respondents' alleged injuries are not in the nature of a restriction on their ability to engage in interstate commercial activity unfettered by state regulation but instead relate to their status as Ohio and Michigan taxpayers. Such injuries are not within the zone of interests protected by the negative Commerce Clause. *Cf. General Motors Corp.* v. *Tracy*, 519 U.S. 278, 300 (1997) ("The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.").[5] The injuries alleged by the Ohio respondents fail the "zone of interest" test for the additional reason that "[i]t is not a purpose of the Commerce Clause to protect state residents

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[5] Although the injury to Kim's Auto's automotive repair business may relate to commerce, the Complaint does not allege that Kim's Auto engages in interstate as opposed to intrastate commerce. Furthermore, that injury is the result of the City's exercise of eminent domain power, not the Ohio ITC. Thus, the injury sustained by Kim's Auto would seem to fall within the zone of interests protected by the Takings Clause, not the Commerce Clause. *See Kelo* v. *City of New London*, 125 S. Ct. 2655 (2005).

from their own state taxes." *Goldberg* v. *Sweet*, 488 U.S. 252, 266 (1989).

Furthermore, a review of this Court's negative Commerce Clause cases that address the issue of standing confirms respondents' lack of standing. Those cases indicate that, for a plaintiff to have standing to challenge a state law on Commerce Clause grounds, the plaintiff must have suffered financial or economic injury as either a competitor or a consumer in the marketplace.[6]

In *Boston Stock Exchange*, *supra*, regional stock exchanges located outside of New York challenged New York's tax on securities transactions as violative of the Commerce Clause. This Court held that the regional exchanges had suffered an "injury in fact" because the discriminatory New York tax "diverted business from their facilities to exchanges in New York." 429 U.S. at 320 n.3. The Court also held that the regional exchanges passed the "zone of interest" test because they were "asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business." *Id.*

In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), liquor wholesalers challenged Hawaii's tax on wholesale liquor sales, alleging that the tax discriminated against interstate commerce by exempting two locally produced liquors. The State of Hawaii argued that the wholesalers lacked standing "because they have shown no economic injury from the claimed discriminatory tax," *id.* at 267, but this Court disagreed. Because the tax "increase[d] the price of their products as compared to the exempted beverages,"

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[6] In addition to the cases discussed hereafter, this Court has upheld the standing of States to bring suit under the negative Commerce Clause. *See Wyoming* v. *Oklahoma*, 502 U.S. 437, 446-450 (1992); *Maryland* v. *Louisiana*, 451 U.S. 725, 735-736 (1981). Those cases are of no help to respondents, however, because no State has challenged the Ohio ITC. On the contrary, at the certiorari stage of this case, 27 States and the District of Columbia filed a brief *amici curiae* in support of petitioners.

this Court concluded that the wholesalers were "surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business." *Id.*

In *Franchise Tax Board of California* v. *Alcan Aluminium Ltd.*, 493 U.S. 331 (1990), two foreign companies brought challenges under the foreign Commerce Clause to California's accounting method for determining the locally taxable income of the companies' wholly-owned American subsidiaries. This Court held that the foreign companies had Article III standing, explaining that California's "method threatens to cause actual financial injury to [the companies] by illegally reducing the return on their investments in [their subsidiaries] and by lowering the value of their stockholdings." *Id.* at 336.

In *General Motors*, *supra*, General Motors challenged Ohio's natural gas sales tax scheme which discriminated against out-of-state sellers by exempting sales made by in-state sellers. This Court held that General Motors, which purchased almost all of its natural gas from out-of-state sellers, suffered "cognizable injury," and had standing, based upon its status as a consumer of out-of-state gas subject to the higher tax. The Court explained that General Motors had standing as a "customer [who] is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers." 519 U.S. at 286.

In contrast to the foregoing cases, the Ohio ITC does not "divert[ ] business" from respondents to out-of-state interests, as in *Boston Stock Exchange*. It does not have an "adverse competitive impact on their business" by raising the prices of their products, as in *Bacchus Imports*. It does not inflict "actual financial injury" on respondents as investors or stockholders, as in *Franchise Tax Board*. And it does not cause them to "pay[ ] more" as consumers purchasing a taxed good, as in *General Motors*. In short, the Ohio ITC does not cause pecuniary injury to respondents as competitors or consumers in the marketplace. Respondents therefore lack

standing to challenge the Ohio ITC under the negative Commerce Clause.[7]

Finally, *Heald* v. *District of Columbia*, *supra*, is also instructive with respect to respondents' lack of standing. There, a District of Columbia resident challenged the constitutionality of a property tax on the ground that the tax applied to nonresidents doing business in the District. This Court held that the challenger—who, as a District resident, was not subject to the tax on nonresidents—lacked standing to complain about that feature of the tax. Justice Brandeis' opinion for the Court explained that "one who would strike down a state statute as violative of the federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him." 259 U.S. at 123. Here, respondents are not "within the class of persons" who may challenge the Ohio ITC on Commerce Clause grounds because they are not affected by the ITC either as competitors or consumers, and the "alleged unconstitutional feature" of the Ohio tax—*i.e.*, the purported Commerce Clause violation—does not cause any injury to them.

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[7] Courts of appeals have rejected the standing of plaintiffs who had far greater claim than respondents to be within the zone of interests of the negative Commerce Clause. *See, e.g.*, *National Solid Waste Mgmt. Ass'n* v. *Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 500 (5th Cir. 2004) (waste management companies challenging flow control ordinance as facially discriminatory held not within zone of interests of the Commerce Clause where their injury was "not related to any out-of-state characteristic of their business"), *cert. denied*, 126 S. Ct. 332 (2005); *Ben Oehrleins & Sons & Daughter, Inc.* v. *Hennepin County*, 115 F.3d 1372, 1381-82 (8th Cir.) (consumers of waste disposal services challenging flow control ordinance held not within zone of interests of the Commerce Clause), *cert. denied*, 522 U.S. 1029 & 522 U.S. 1036 (1997).

II. THE OHIO INVESTMENT TAX CREDIT DOES NOT VIOLATE THE NEGATIVE COMMERCE CLAUSE.

A. The States Have Wide Latitude To Structure Their Tax Systems To Encourage Domestic Industry And Long Have Done So.

The starting point for analysis of respondents' challenge to the Ohio ITC must be the principle that "[t]he States have a very wide discretion in the laying of their taxes." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 526 (1959). For "in taxation, even more than in other fields, [state] legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940). As discussed below, the power to tax is an essential attribute of state sovereignty. *See infra* at 22.

The wide latitude possessed by States with respect to their tax structures extends to the selective granting of tax exemptions. "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation *and to grant exemptions*." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937) (emphasis added). "Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one, or to restrict or suppress the other." *Id.* at 512 (citations omitted).[8]

This Court has observed that "it is standard practice for States to grant [tax] exemptions to commercial entities" to promote local industry. *Department of Revenue of Ore.* v. *ACF Indus., Inc.*, 510 U.S. 332, 347 (1994). And that practice is as deeply rooted as it is common. More than a century ago, this Court noted that "the states vary materially in their systems of taxation. Each determines for itself what in its judgment is best for the interests of its people. * * * Some, in order to encourage certain industries, such as

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[8] As the party challenging the constitutionality of the Ohio ITC, respondents "carry the burden of showing that the tax deprives them of rights which the Commerce Clause protects." *Bode* v. *Barrett*, 344 U.S. 583, 585 (1953).

manufacturing, make either general or special exemptions." *Florida Cent. & Peninsular R.R.* v. *Reynolds*, 183 U.S. 471, 476 (1902). *See also Salt Co.* v. *East Saginaw*, 80 U.S. 373, 378 (1871).[9]

The longstanding state practice of granting tax exemptions to encourage particular forms of industry was frequently challenged on equal protection grounds around the turn of the Twentieth Century. This Court repeatedly rejected such challenges and in so doing underscored the authority of states to engage in that practice. *See Quong Wing* v. *Kirkendall*, 223 U.S. 59, 62 (1912) (Holmes, J.) (rejecting equal protection challenge to state law taxing laundry business but exempting steam laundries; observing that "a state may carry out a policy" by "adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry"); *American Sugar Ref. Co.* v. *Louisiana*, 179 U.S. 89, 95 (1900) (upholding over equal protection challenge state law taxing sugar refining but exempting those who refine sugar from their own plantations as permissible "encouragement to agriculture"); *see also Florida Cent. & Peninsular R.R.*, 183 U.S. at 480 (noting that "if the state of Florida had deemed it for the best interests of its people to encourage the building of railroads by exempting their property from taxation, such exemption could not have been adjudged in conflict with the 14th Amendment, even though thereby the burden of taxation upon other property in the state was increased.").

The fact that this longstanding state practice has gone without successful challenge until this case is *prima facie* evidence of the constitutionality of such exemptions. *Cf. Walz* v. *Tax Comm'n of New York City*, 397 U.S. 664, 678 (1970) (relying on "unbroken practice of according [property tax] exemption to churches" in rejecting Establishment Clause

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[9] *Salt Co.* involved a Michigan statute that encouraged in-state salt production by, among other means, granting a property tax exemption for all property used by any corporation or individual "for the purpose of boring and manufacturing salt in this State." 80 U.S. at 374.

challenge to such exemptions). As Justice Brennan wrote in *Walz*, the long history of a challenged practice, although "not conclusive of its constitutionality * * * is a fact of considerable import in the interpretation of abstract constitutional language." *Id.* at 681 (concurring opinion). That observation carries special force in the context of this case, because the language of the Commerce Clause "does not expressly prohibit the States from doing anything." *United States* v. *International Bus. Mach. Corp.*, 517 U.S. 843, 851 n.2 (1996). *See also Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (finding "significant" for purposes of interpreting the Commerce Clause the "absence of any previous challenge" to a state program designed to "encourage[e] local enterprise" of the sort then before the Court).

Since 1995, thousands of corporate taxpayers, including petitioner DaimlerChrysler, relying upon the Ohio ITC, have invested more than $30 billion in plants and equipment in Ohio. *See* 04-1704 Pet. 4. The substantial reliance interests at stake also caution against construing Congress' power to regulate interstate commerce as implicitly forbidding the ITC. *Cf. Quill Corp.* v. *North Dakota*, 504 U.S. 298, 317 (1992).

B. This Court Has Repeatedly Recognized That States May Encourage In-State Investment Through Tax Incentives Without Violating The Negative Commerce Clause.

The District Court ruled in this case that holding the Ohio ITC unconstitutional would require the court "to violate the clear mandate of Supreme Court precedent." 04-1704 Pet. App. 29a. The District Court was correct in its assessment of this Court's precedents.

This Court in numerous cases has recognized that the negative Commerce Clause permits States to take steps to encourage local industry and investment and create jobs, including through the structure of their tax laws. In *Boston Stock Exchange*, *supra*, this Court in a unanimous opinion con-

firmed that States may "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry," and may "compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy." 429 U.S. at 336, 336-337. *Accord Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358, 385-386 (1991); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 645-646 (1984); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 406 n.12 (1984). In *Bacchus Imports*, *supra*, this Court stated that "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." 468 U.S. at 271. And in *Trinova Corp.*, *supra*, in rejecting a Commerce Clause challenge to Michigan's single business tax, this Court stated that "[i]t is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." 498 U.S. at 385. *See also Armco Inc.*, 467 U.S. at 645 (Commerce Clause permits "fair encouragement of in-state business").[10]

This Court has also indicated that a State, without violating the negative Commerce Clause, may use low taxes and tax exemptions to draw industry to the State. In *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994), the Court noted that "it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or *low taxes*." *Id.* at 199 n.15 (emphasis added). And in *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997), the Court stated that "[t]he States are, of course, free to provide generally applicable nondiscriminatory tax exemptions without running afoul of the dormant Commerce Clause." *Id.* at 588 n.19.

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[10] The Sixth Circuit itself acknowledged in this case that there was no dispute that "it is legitimate for Ohio to structure its tax system to encourage new intrastate economic activity." 04-1704 Pet. App. 4a.

Members of the Court have also commented on the constitutionality of tax credits and tax breaks specifically. In *Alexandria Scrap Corp., supra*, Justice Stevens expressed the view that the negative Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry," and that such methods may include "a cash subsidy, *a tax credit*, or a special privilege intended to attract investment capital." 426 U.S. at 816 (concurring opinion) (emphasis added). Chief Justice Rehnquist similarly observed in *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992), that "[t]here seems to be nothing * * * that would prevent [a State] from providing subsidies *or other tax breaks* to domestic industries * * *." *Id.* at 351 (dissenting opinion) (emphasis added).

As the foregoing observations suggest, there is no difference in economic terms between a tax credit and a subsidy—a point that respondents themselves have made. *See* Complaint ¶ 39 ("By means of § 5733.33, the State of Ohio has provided DaimlerChrysler with a subsidy of many millions of dollars * * *."); *see also New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 277 (1988) (noting that "the tax credit scheme has the purpose and effect of subsidizing a particular industry"); *Westinghouse Elec. Corp.*, 466 U.S. at 406 n.12 (discussing similarity of an investment tax credit to an indirect subsidy).

This Court has indicated that subsidies generally do not violate the negative Commerce Clause. In *New Energy Company, supra*, this Court in a unanimous opinion stated:

> The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does. [486 U.S. at 278 (emphasis omitted).]

Similarly, in *West Lynn Creamery, supra*, the Court declared that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." 512 U.S. at 199. *See also id.* at 211 (Scalia, J., concurring in the judgment); *Alexandria Scrap Corp.*, 426 U.S. at 815-816 (Stevens, J., concurring).

Because the State of Ohio could have directly subsidized DaimlerChrysler without violating the negative Commerce Clause, and because the Ohio ITC is in substance no different than a subsidy, the Court should uphold the ITC against respondents' challenge. To do otherwise would be to elevate form over substance. *See City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 461 (1958) ("[E]mpty formalisms are too shadowy a basis for invalidating state tax laws.").[11]

In *New York* v. *Roberts*, 171 U.S. 658 (1898), this Court rejected a Commerce Clause claim very similar to the one that respondents assert here. In *Roberts*, this Court considered a New York statute imposing a franchise tax on all corporations doing business in New York but exempting companies wholly engaged in manufacturing within the State. This Court upheld the constitutionality of the statute against an attack brought by a Michigan corporation ineligible for the exemption. Reviewing the statute for conformity with, *inter alia*, "the freedom of interstate commerce," *id.* at 664, this Court's decision turned on the fact that the statute did not "distinguish between New York corporations and those of other states to the detriment of the latter, or * * * subject property out of the state to taxation." *Id.* at 663. With respect to the exemption for companies wholly engaged in manufacturing within New York, this Court acknowledged that "the tendency of the legislation" may be to "encourage

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[11] *Camps Newfound/Owatonna* does not compel a contrary conclusion. Although the Town of Harrison in that case sought to defend a property tax exemption as economically no different than a subsidy, *see* 520 U.S. at 589-591, the exemption was "facially discriminatory," *id.* at 582 n.16. In contrast, the Ohio ITC does not discriminate against interstate commerce, on its face or in any other respect.

manufacturing corporations which seek to do business in that state to bring their plants into New York," but the Court explained that "so long as the privilege is not restricted to New York corporations, it is not perceived that thereby any ground is afforded to justify the intervention of the federal courts." *Id.* at 665-666. Like the New York tax statute upheld in *Roberts*, the Ohio ITC exempts in-state investment from a generally applicable tax on corporations. And like the statute in *Roberts*, the ITC is not limited to Ohio corporations but is available to any corporation that invests in Ohio. Thus, *Roberts* would appear to control this case.

The constitutionality of the Ohio ITC is also supported by *Allied Stores of Ohio, supra*, in which this Court upheld against an equal protection challenge an Ohio law exempting out-of-state corporations from an *ad valorem* property tax paid by Ohio corporations. This Court explained that "it has repeatedly been held and appears to be entirely settled that a statute which encourages the location within a State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment." 358 U.S. at 528. It would be strange indeed if the Constitution allowed a State to give a tax exemption to out-of-state corporations while denying exemption to in-state corporations but did not allow a State to make a tax exemption, like the Ohio ITC, available to both in-state and out-of-state corporations.

C. The Ohio Investment Tax Credit Is Fully Consistent With—If It Even Implicates—The Negative Commerce Clause.

Assuming that this Court's prior cases upholding and discussing tax exemptions, tax credits, subsidies, and other means of encouraging domestic industry do not foreclose respondents' negative Commerce Clause challenge, that challenge must still fail. Indeed, it is far from clear that the Ohio ITC is even "the kind of action with which the Commerce Clause is concerned." *Alexandria Scrap Corp.*, 426 U.S. at 805.

Last Term, in *American Trucking Associations, Inc.* v. *Michigan Public Service Commission*, 125 S. Ct. 2419 (2005), this Court held that a Michigan statute imposing a $100 annual tax on trucks engaged in intrastate commercial hauling did not violate the Commerce Clause. In the key passage in the Court's opinion, the Court explained that

> we find nothing in [the Michigan statute] that offends the Commerce Clause. To begin with, Michigan imposes the flat $100 fee only upon intrastate transactions—that is, upon activates taking place exclusively within the State's borders. [The statute] does not facially discriminate against interstate or out-of-state activities or enterprises. The statute applies evenhandedly to all carriers that make domestic journeys. It does not reflect an effort to tax activity that takes place, in whole or in part, outside the State. Nothing in our case law suggests that such a neutral, locally-focused fee or tax is inconsistent with the dormant Commerce Clause. [*Id.* at 2423.]

So too here, Ohio's ITC applies only to "intrastate transactions"—"activities taking place exclusively within the State's borders." The ITC also "applies evenhandedly" as it "does not facially discriminate against interstate or out-of-state activities or enterprises." And it does not "tax activity that takes place, in whole or in part, outside the State." Under *American Trucking*, the Ohio ITC is "neutral, locally-focused" tax provision fully consistent with the negative Commerce Clause. *See also City of Chicago* v. *Willett Co.*, 344 U.S. 574, 577 (1953) (referring to "a State's undoubted power over its own internal commerce"); *Salt Co.*, 80 U.S. at 378 (characterizing a state law exempting from tax an in-state industry that the state sought to promote as a law "regulative of the internal economy of the State").

D. Federalism Principles Support Ohio's Investment Tax Credit.

Any claim that a state statute violates the negative Commerce Clause should be judged with an eye toward principles of federalism. Thus, in assessing respondent's challenge to

the Ohio ITC, it is appropriate, even necessary, to consider how the ITC implicates such principles.[12]

In *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), in upholding a South Dakota resident-preference policy against a Commerce Clause challenge, this Court explained that its decision was supported by a "healthy regard for federalism and good government" and permitted state experimentation to take place. *Id.* at 441 (citing *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). *See also Alexandria Scrap Corp.*, 426 U.S. at 817 (Stevens, J., concurring) (stating that the Commerce Clause does not "provide the basis for questioning a State's right to experiment with different incentives to business").

It is especially important to consider federalism principles in this case because a state taxation statute is at issue, and "the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests." *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 159 (1930). *See also Department of Revenue of Ore.*, 510 U.S. at 345 ("[T]he taxation authority of state government [is] an authority we have recognized as central to state sovereignty."); *Madden* v. *Kentucky*, 309 U.S. at 93. As in *Reeves*, "[r]estraint in this area is also counseled by considerations of state sovereignty, the role of each State as guardian and trustee for its people." 447 U.S. at 438 (footnote and internal quotation marks omitted).

One of the chief purposes and advantages of our federalism is that it fosters competition between the States. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991) (noting that federalism "makes government more responsive by putting the States in competition for a mobile citizenry"). Because individuals and corporations are free to move from one State to another,

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[12] As Justice Brennan once observed, "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action." *Allied Stores of Ohio, Inc.*, 358 U.S. at 532 (concurring opinion).

federalism leads States to vie with each other to offer a combination of laws, taxes, and services that will attract those outside of the State to come to it and those in the State to remain there. Of course, competition between States is also at heart of the Commerce Clause. *See Bacchus Imports, Ltd.*, 468 U.S. at 272 (noting that "competition among the States for a share of interstate commerce is a central element of our free-trade policy"); *Boston Stock Exch.*, 429 U.S. at 336-337 (emphasizing that a State may "compete with other States for a share of interstate commerce").

The Ohio ITC encourages both in-state and out-of-state businesses to invest in Ohio rather than other States. Thus, Ohio's enactment of the ITC is a laudable example of the interstate competition that the Constitution both permits and encourages. As Justice Brennan commented in *Zobel* v. *Williams*, 457 U.S. 55 (1982):

> a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully—indeed, necessarily—consistent with the Framers' further idea of joining these independent sovereigns into a single Nation. [*Id.* at 67-68 (concurring opinion).]

Although Justice Brennan's comments about States attracting citizens with lower taxes were directed toward individual citizens, what he said also holds true with respect to corporate citizens. Recognizing Ohio's authority to use tax breaks to entice businesses to come to or remain in the State is essential to "the very idea of maintaining the States as independent sovereigns." *Id.*

Permitting States to compete for investment through the provision of tax credits is crucial to the economic welfare,

not only of particular States, but of the Nation as a whole. This case illustrates that why that is so. The automobile industry is global, and in the contest to attract automobile manufacturers to base their operations locally, the States compete, not only with each other, but with foreign countries as well. If States cannot use tax credits as an inducement to industry, a company thinking about building a new plant or expanding an existing one in the United States might choose to look overseas instead in search of more attractive options.

The Court has often repeated Justice Cardozo's words that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). In the area of investment tax credits, permitting States to compete—with each other and with foreign nations—makes the several States, our one Nation, and all Americans better off.

III. NISSAN'S OWN INVESTMENT EXPERIENCE IN TENNESSEE ILLUSTRATES THE IMPORTANCE OF STATE TAX INCENTIVES TO STATE ECONOMIES AND TO THE ABILITY OF STATES TO COMPETE FOR INVESTMENT.

For nearly half a century, the State of Tennessee has sought to encourage the location in Tennessee of plants and equipment by high wage industries by providing a variety of tax incentives for such investment. *See McConnell* v. *City of Lebanon*, 314 S.W.2d 12, 20 (Tenn. 1958) (noting that "the matter of inducing industry to locate in this State has become a matter of great public concern" and that "[t]he modern tendency is to meet that challenge by appropriate legislation"). A centerpiece of these efforts was the State's successful negotiation in 1980 with Nissan that led Nissan to locate in Smyrna, Tennessee, Nissan's first automobile manufacturing plant in the United States. The Smyrna plant is one of the largest automotive production plants under one roof in the United States. Nisson subsequently constructed a sepa-

rate plant in Decherd, Tennessee. Since 1980, Nissan has invested $2.8 billion in plants and equipment in Tennessee and created some 12,000 jobs at these plants. *See Nissan Plans to Expand Pathfinder Production Facility in Tennessee*, Newport Plain Talk (June 26, 2003) (investment in Tennessee); *Nissan to Expand Decherd Powertrain Plant*, Bus. Wire (July 16, 2004) (number of jobs).

The effect of these industrial recruitment efforts has transformed Tennessee's economy. In each of the last nine years, manufacturers in Tennessee have invested between $2 billion and $4.4 billion in plants and equipment. *See* Tom Sharp, *Federal Case on Tax Breaks Could Affect Tennessee*, The Tennessean (Sept. 13, 2004). Nissan's Smyrna plant, along with others, has spawned the location of more than 950 parts manufacturing plants and supplier facilities in and around Middle Tennessee, collectively estimated to employ more than "154,000 Tennesseans representing 33% of the state's manufacturing workforce and 5.7% of total state employment." *Nissan Announces 1,500 Jobs Coming to Smyrna*, Lewisburg Trib. (June 26, 2004). This job multiplier effect makes the automotive industry, in particular, a highly sought-after boon for state economies. Each manufacturing job at a major automotive facility like that operated by Nissan at Smyrna spins off an additional 9.4 jobs. Institute of Labor and Industrial Relations at the University of Michigan, *et al.*, *Contribution of the U.S. Motor Vehicle Industry to the Economies of the United States, California, New York, and New Jersey in 2003* (May 2004) (available at http:/www.cargroup.org/pdfs/ContributionStudy.pdf).

Tennessee, a comparatively low wage state,[13] has benefited immensely from the high paying jobs created by Nissan's multi-billion investment in its Tennessee plants. Assembly line jobs at Nissan's Smyrna and Decherd facilitates provide

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[13] Tennessee ranked thirtieth among the 50 States and District of Columbia for average annual pay in 2001. *See* Bureau of Labor Statistics, State Average Annual Pay for 2000 and 2001 (available at www.bls.gov/news.release/annpay.t02.htm).

an average annual wage in excess of $57,000—more than $25,000 above the state average. *See Nissan Expansion Good News for Regional Economy*, Daily News J. (July 21, 2000) (citing Tennessee Commissioner of Economic and Community Development); Bureau of Labor Statistics, *supra*. All told, Tennessee's automotive manufacturers provide jobs, with a Tennessee's payroll in excess of $5.7 billion, which represent the first opportunity for thousands of Tennessee families to move solidly into the middle class.

The tax incentives that States such as Ohio and Tennessee offer are critical to competition for investment among the various States, but also are increasingly important in competing with other countries for investment in the global marketplace. Nissan's experience illustrates that in a global economy, particularly since the ratification of NAFTA, States within the United States compete for manufacturing jobs not only among themselves, but also with foreign countries.[14]

In 2001, for example, when Nissan decided to expand its engine plant in Decherd, Tennessee, as part of an overall Tennessee investment of more than $1 billion, Nissan added approximately 1,000 additional high paying Tennessee jobs. *See* Bernard Bush, *Decherd to Get Nissan Metal Forge*, The Tennessean (July 17, 2004). In 2004, Nissan further expanded the Decherd facility to add a crankshaft production center. *See id.* In deciding where to place this operation, Nissan's business determination ultimately came down to a choice between expanding its Decherd facility or its factory in Aguascalientes, Mexico, where Nissan currently annually manufactures 250,000 Sentra automobiles, many of which are exported duty-free to the United States. The tax incentives offered to Nissan by Tennessee played a significant role in offsetting the very substantial wage differential between Tennessee and Mexico and thus were an important factor in

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[14] Tennessee was one of the 27 States that jointly filed a certiorari stage *amici* brief supporting petitioners in this Court. Tennessee, along with Kentucky and Michigan, also filed an *amici* brief in the Sixth Circuit urging *en banc* review.

Nissan's decision to invest in its Decherd plant for this project. In other major Tennessee investments in the past four years, Nissan has established new production lines and expanded facilities for manufacturing its Pathfinder and Maxima vehicles in Smyrna. The recent Pathfinder and Maxima operations, together with the recent Decherd engine plant expansion and crankshaft production line, added more than 2,000 Tennessee Nissan jobs—all transferred from existing facilities in Japan. *See* Wayne Thomas & Larry Nee, *Nissan Plans Forging Plant*, Herald Chron. (July 20, 2004); John Callow, *Nissan to Add 1,500 More Jobs*, Daily News J. (June 26, 2003).

In sum, Nissan's own investment experience in Tennessee shows the importance of state tax incentives to state economies and to the ability of States to compete for investment.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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